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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

CHANNEL TWO TELEVISION COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ILLINOIS BROADCASTING CO., INC., ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

POST COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

1. The six petitions for a writ of certiorari that have been filed in this case present two major questions: first, whether the Federal Communications Commission properly adopted a prospective rule that prohibits the grant of a new broadcast license to a person who controls a daily newspaper in the same community; second, whether the Commission properly concluded that existing newspaper-broadcast combinations in the same community should be dissolved only when the combination has a monopoly of the broadcast media.

The United States appeared before the Commission to argue that, as a matter of the proper interpretation of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, the Commission should order the dissolution of all existing newspaper-television combinations in the same market and decline to create new combinations. After the Commission adopted a rule barring the creation of new combinations but declining to dissolve most existing combinations, the United States argued in the court of appeals, where it was a statutory respondent to petitions filed by private parties, that the Commission had offered insufficient and inconsistent reasons for its decision not to dissolve existing combinations.

The court of appeals upheld the prospective ban and concluded that the Commission should treat existing combinations under the same rules that it applies to new combinations. It accordingly ordered the Commission to dissolve the existing newspaper-broadcast combinations.

2. The United States believes that the court of appeals correctly sustained the Commission's authority to decide not to permit the creation of any new communications combinations, and it continues to believe that the Commission did not properly support its decision not to apply to existing communications combinations the same rules it adopted to forbid the creation of new combinations.

The United States agrees with the Commission, however, that the court of appeals exceeded its authority to the extent that it went beyond setting aside the Commission's order and purported finally to decide administratively unresolved questions concerning cross-ownership in advance of their consideration by the Commission in proceedings on remand. See *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. After identifying the deficiencies in the Commission's reasoning, the court of appeals should have remanded the case to the Commission, leaving that agency free, in the exercise of its discretion, to formulate a new rule properly based on a reasoned application of the governing legal principles.

In these circumstances, an appropriate disposition of the case would be to deny the petitions challenging the prospective rule, and to grant the remaining petitions only for the purpose of summarily vacating the judgment of the court of appeals to the extent that the court of appeals has exercised discretion properly belonging to the Commission. The United

States recognizes, however, that because the terms of any remand would be closely related to the proper disposition of the merits of the challenge to the Commission's rules, and because of the general importance of the court of appeals' interpretation of the Communications Act, this Court may deem it more appropriate to give the case the detailed consideration that would require granting plenary review of all the petitions.

Therefore, although the United States agrees with much of the reasoning of the court of appeals and with the broad outlines of its judgment, it does not oppose the granting of review in this case. If the Court should grant review, the United States will argue (1) that the Commission's rule forbidding the creation of new communications combinations was proper, (2) that the Commission's rule permitting the continued existence of other communications combinations should be set aside, and (3) that the case should be remanded to the Commission.

Respectfully submitted.

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Solicitor General.

SEPTEMBER 1977.

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